

CRIMINAL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: PART TP3

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PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

– against –

Docket No. [REDACTED]

[REDACTED]

Defendant.

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[REDACTED]

Defendant's motion to (1) suppress all evidence obtained as a result of his arrest, which he contends was without probable cause, including statements made by him, observations of him by police, including video recordings, and the results of any chemical test of his breath, (2) suppress all properly noticed statements made by him to police as involuntarily made, and (3) preclude statements for which notice was not given, is **granted in part and denied in part**.

Defendant [REDACTED] was arrested December 29, 2018 and charged with Operating a Vehicle While Impaired by Alcohol, V.T.L. § 1192(1). At his arraignment, the People served notice pursuant to C.P.L. § 710.30(1)(a) of statements made by the defendant to police in connection with his arrest. Shortly before the commencement of the hearing on the instant motions, the People filed a superseding information, containing identical factual allegations and adding the charge of Operating a Vehicle While Intoxicated by Alcohol, V.T.L. § 1192(3).

On March 20, 2019 and March 21, 2019, this court held a *Huntley/Dunaway/Ingle/Johnson* hearing. The People presented two witnesses, Police Officer Dmitriy Lyubchenko and Police Officer Joseph Vitale. The defense did not present any witnesses. At the conclusion of the hearing, the court rendered its decision from the bench after placing its findings of fact and conclusions of law on the record. The court found the testimony of both of the People's witnesses to be incredible in substantial part. The facts that were established by the evidence, and found by the court, are as follows.

## FINDINGS OF FACT

In the early morning hours of December 29, 2018, Officers Lyubchenko and Vitale were on routine patrol in a marked police vehicle. At about 1:10 a.m., they stopped a car driven by [REDACTED]. The events leading up to and including the stop were captured on a “dash cam” audio and video recorder mounted inside the police vehicle.

The dash cam footage shows the police vehicle travelling southbound on the Bronx River Parkway. Traffic is not heavy, but there are a number of vehicles on the roadway. Some pass the officers’ vehicle, some are passed by the police vehicle. Eventually, the officers exit the Parkway at the Fordham Road exit. The exit is visible in the distance before the officers reach it. At no time while the exit is in view is any vehicle seen leaving the Parkway by that exit. Nor is any vehicle visible on the exit ramp itself once the officers are on it. The exit ramp is somewhat long and curves a bit as it opens onto westbound Fordham Road. Once the officers follow the curve of the road, two separate vehicles can be seen travelling along the ramp. The police pass each of them. Eventually the first intersecting street, Southern Boulevard, can be seen ahead in the distance, with several cars stopped at or slowed approaching that intersection. A white car makes a left turn onto Southern Boulevard. This vehicle is somewhat ahead of the police car, perhaps the equivalent of a block or more. The police car soon reaches the intersection, and makes a left turn onto Southern Boulevard. Once it turns, the white car is again visible, stopped, facing southbound, at the red light on the corner of Southern Boulevard and the eastbound Fordham Road roadway.<sup>1</sup> It is the lone car stopped on the southbound side of that light, and the officers pull up behind it. The officers immediately turn on their lights and sirens and direct the driver to remain where he is and not move his car.

The white vehicle was being operated by the defendant. The video shows that the officers approached the defendant’s car, told him that was being pulled over for speeding, and asked for his license and registration. The defendant replied, “I’m good,” and provided his license and registration. The officers went back to their vehicle. They then returned to the defendant’s vehicle and asked him to get out of the car. He got out of the car without any difficulty and walked completely unsupported and without swaying to the back of his vehicle, where the officers directed him to go.

At that time, the officers told him he was going to take a portable breath test. The defendant then questioned whether he had to take it. A conversation ensued between the two officers and the defendant regarding the portable breath test and whether or not he was going to take it. During that conversation, the defendant spoke without slurring. His statements were coherent and responsive to what the officers were saying. The defendant ultimately decided that he would not consent to take the portable breath test, and said so in no uncertain terms. At that point, the officers placed him in custody. He was handcuffed and placed in the back of the police

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<sup>1</sup> As the video shows, for this stretch of Fordham Road, the eastbound and westbound roadways are not adjacent to each other, but rather are separated by an elevated overpass and underpass. At the point of the stop here, the eastbound roadway is a short block away from the westbound roadway, and Southern Boulevard runs perpendicular between them.

vehicle. While the defendant was in the back of the police vehicle, the officers spoke to him about having his girlfriend pick up his car. Defendant expressed some anxiety and regret about matters involving his girlfriend, unrelated to this arrest. One of the officers gave him feedback about his romantic travails, saying something to the effect of, "These things never work out."

The defendant was then taken to the 45 Precinct's Intoxicated Driver Testing Unit (IDTU), where he was asked to submit to a series of tests, which were recorded on video. The defendant voluntarily agreed to submit to a breathalyzer test, which revealed a blood alcohol content (BAC) of .055. This was within 40 to 45 minutes of the stop of his vehicle. He also submitted to physical coordination tests and the gaze nystagmus test. During the gaze nystagmus test, the camera did a close up on the defendant's eyes, which revealed that they were not watery or bloodshot. During the coordination tests, his balance was good and he did not sway at all. Throughout his interactions with the officers at the 45 Precinct, defendant did not slur his words, and he was calm and cooperative with the officers.

After these tests, the defendant was given his *Miranda* warnings. After he received these warnings, he clearly and responsively agreed to answer questions.

### INCREDIBLE TESTIMONY

The foregoing are the findings of fact by this court. Before proceeding to conclusions of law, a few words should be said about the testimony that was disregarded as not credible.

Officer Vitale testified that defendant's vehicle was speeding on the Bronx River Parkway. Officer Lyubchenko also so testified, and added that defendant's car had been in the far left lane as the officers travelled a few hundred feet behind it, and crossed over to the right lane in one motion to take the exit. The dash cam video was introduced by the People as an exhibit, and the court viewed the exhibit repeatedly, asking that it be replayed from the beginning several times during its initial publication and again after both sides rested. There is simply no white vehicle seen speeding on the Parkway, or exiting at Fordham Road. Once the officers are on the exit ramp and follow the curve, two cars become visible. One is a dark car, so is not defendant's. The other is a white car, but the officers pass it, so that is not defendant's either. The People made no effort to have either officer indicate to the court where defendant's car could be seen on the dash cam footage anywhere on the Bronx River Parkway, the exit ramp, or the stretch of Fordham Road approaching Southern Boulevard. Defendant's car does not appear in front of the police car until it makes the left turn onto Southern Boulevard as the officers are just getting into sight range of that intersection. The officers' testimony that defendant was speeding on the Bronx River Parkway, and that he sped across three lanes to take an exit, is not supported by the several minutes of clear video footage, and so is just not credible.

The court also finds incredible the testimony of both officers that defendant was unsteady on his feet when he got out of his vehicle and walked to the rear of the car. Besides using the adjective "unsteady," one officer described "a little sway in his stance," and the other said that he was "swaying" and had to support himself by leaning on the car. This testimony is completely

contradicted by the dash cam video footage, however. The clear footage shows defendant get out of his car without even touching the already-opened door. He walks, without the slightest sway, to the rear of the vehicle. He never touched or leaned on the car. He stands at the rear of the vehicle with the two officers flanking him, and holds a steady posture during what could be called a pressured exchange about taking the portable breath test. In addition to the dash cam footage from the scene, the IDTU video, which was taken at most 45 minutes later, also shows that the defendant had steady balance and was not swaying at all.

Similarly, the officers' testimony that defendant had "watery and bloodshot eyes" was belied by the clear, close-up, sustained video depiction of defendant's eyes in the IDTU video. The video operator, while filming the gaze nystagmus test, zoomed in on defendant's eyes and filmed the complete test for a full minute or two. Defendant's eyes are clearly visible, and are not the least bit watery or bloodshot. Officer Vitale initially suggested, when questioned about this discrepancy, that things can look different on the video because of the lighting in the IDTU room. However, when asked directly, Officer Vitale finally acknowledged that nothing looked different on this video from what he saw in person.

All but one of the reasons given by the officers for their decision to place defendant in custody were contradicted by the clear, direct video footage. The claims of speeding, crossing three lanes of traffic, unsteadiness on his feet, and having watery and bloodshot eyes are thus not believed by this court. The only factor in the officers' testimony that is not possible to verify by video is "the odor of an alcoholic beverage on his breath." As to this factor, this court declines to believe the officers' testimony simply because it is uncontradicted. All of the other factors that the officers asserted to be true are belied by other evidence. This court finds no reason to trust the officers on the one factor that is not possible to videotape. *See People v Johnson*, 225 A.D.2d 464 (1st Dept. 1996).

## CONCLUSIONS OF LAW

### **(1) Motion to Suppress Evidence as Fruit of an Unlawful Arrest.**

At a suppression hearing, the People have the initial burden of establishing the legality of the police conduct at issue. *People v. Berrios*, 28 N.Y.2d 361, 367 (1971); *People v. Whitehurst*, 25 N.Y.2d 389, 391 (1969); *People v. Malinsky*, 15 N.Y.2d 86, 96 (1965). To meet their burden, the People must present the hearing court with the facts upon which the police acted, and sufficient evidence for the court to make its own independent determination of the legality of the police conduct. *See People v. Dodt*, 61 N.Y.2d 408, 416 (1984). The prosecution must present "facts, not assurances," and "summary statements that the police had arrived at a conclusion that sufficient cause existed will not do." *Id.* at 415 (quoting *People v. Bouton*, 50 N.Y.2d 130, 135 (1980)).

Here, the People had the burden of establishing a legal basis for the initial stop of the

defendant's car. To legally stop a vehicle for a traffic offense, police must have, at a minimum, reasonable suspicion that the defendant has violated the Vehicle and Traffic Law. *People v. Ingle*, 36 N.Y.2d 413 (1975).<sup>2</sup> The People here presented no credible reason for the officers to have detained defendant at the traffic light, or to have asked him to exit the car, or to have put him in handcuffs. The claim that defendant was speeding was the reason given for the initial approach, but that testimony was not credible. Nor was the claim credible that defendant was put in handcuffs because he had watery and bloodshot eyes, was "unsteady on his feet" and had "the odor of an alcoholic beverage on his breath."

The court sees no justification established by the People at the hearing for the officers to place the defendant under arrest. As the arrest was without legal justification, any evidence obtained as a result the arrest must be suppressed. *Dunaway v. New York*, 442 U.S. 200 (1979). This includes the statements made by the defendant while in the back of the patrol car, as well as his statements at the precinct, observations made by police, video recordings of the defendant, and the results of any chemical test of the defendant's breath.

## **(2) Motion to suppress noticed statements as involuntary.**

Before the People can use the defendant's statements to law enforcement against him at trial, the People must show that those statements were voluntarily made. *People v. Anderson*, 42 N.Y.2d 35 (1977); *People v. Huntley*, 15 N.Y.2d 72, 78 (1965). At a *Huntley* hearing, the People have the burden of proving voluntariness beyond a reasonable doubt. *Id.*

*Miranda v. Arizona* requires that a defendant in custody be warned of his constitutional rights prior to "custodial interrogation," defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. 436, 444 (1966). "It is now well settled that unless a police officer administers *Miranda* warnings to a suspect in his custody, any statement elicited from the suspect cannot be admitted against him in a subsequent criminal trial." *People v. Harris*, 48 N.Y.2d 208, 215 (1979).

Here, there is no dispute that all of the defendant's statements at the scene were without any kind of *Miranda* warning. The dash cam video shows that the defendant made several statements while he was under arrest in the back of the patrol car. Almost none of these statements were noticed pursuant to C.P.L. § 710.30(1), as discussed below. However, the video also shows that these statements were, for the most part, spontaneous. Volunteered statements are admissible provided that they are genuinely spontaneous "and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed." *People v. Rivers*, 56 N.Y.2d 476, 479 (1982) (quoting *People v. Maerling*, 46 N.Y.2d 289, 302-303 (1978)). One

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<sup>2</sup> While there may be some argument that the standard for an automobile stop is probable cause, see, e.g., *People v. Robinson*, 97 N.Y.2d 341 (2001), *People v. Wright*, 98 N.Y.2d 657 (2002), that distinction is irrelevant here as the People did not even establish the lesser standard of reasonable suspicion.

possible exception in this case was when the officer started trying to give the defendant relationship advice, saying “these things never turn out well.” That invitation by the officer to continue the conversation could have been reasonably calculated to elicit a response. For *Miranda* purposes, “interrogation” is not limited to formal questioning, and broadly includes any police conduct or questioning that is reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291 (1980); *People v. Oramus*, 25 N.Y.2d 825 (1969).

The only noticed statement from this unwarned conversation with the officer while the defendant was under arrest in the back of the patrol car was “I usually don’t do this, I should know better.” This statement is also included in the criminal complaint. The court takes note that the People’s inclusion of this statement in the complaint, without context, suggests misleadingly that the statement is an acknowledgement of wrongdoing related to the reason for his arrest – when, in fact, the video makes clear that it was nothing of the sort. From the dash cam video, which captured the entire conversation, it is apparent that the defendant was referring to his dating life, and not to anything related to drinking or driving. The video also shows that the defendant initiated the conversation, and the court finds that this was a spontaneous, volunteered statement. However, this post-arrest statement is suppressed as fruit of the arrest.

The other statements for which the People gave notice were voluntarily made after the defendant was advised of his *Miranda* rights in the course of questioning at the IDTU. These statements are, however, suppressed as fruit of the unlawful arrest.

### **(3) Motion to preclude unnoticed statements**

Criminal Procedure Law § 710.30(1)(a) requires the People to notify a defendant within 15 days of his arraignment, and before trial, of any statements made by him to law enforcement that the People intend to introduce against him at trial. The strict 15-day requirement has only two exceptions: “[f]or good cause shown,” a court may allow the People to serve late notice, provided that the defendant is given “a reasonable opportunity thereafter to make a suppression motion,” C.P.L. § 710.30(2), or, where the defendant “despite the lack of such notice, moved to suppress such evidence and such motion has been denied” by a final order. C.P.L. § 710.30(3); see C.P.L. § 710.70. If neither exception applies, “no evidence of a kind specified in subdivision one may be received against [defendant] upon trial.” C.P.L. § 710.30(3). The statute ensures “the orderly, swift and efficient determination of pretrial motions.” *People v. O’Doherty*, 70 N.Y.2d 479, 487 (1987). Whether a defendant is prejudiced by the lack of notice “is irrelevant.” *People v. Lopez*, 84 N.Y.2d 425, 428 (1994).

The dash cam video presented at the hearing revealed a number of statements by the defendant at the scene for which the People did not serve notice. These include the defendant’s post-arrest statements while in the back of the patrol car, as discussed above, as well as his pre-arrest statements regarding the portable breath test. To the extent that the People would seek to use any of these unnoticed statements from the dash cam video at trial, the statements are precluded for lack of notice pursuant to C.P.L. § 710.30(1).

The defendant's motion to suppress noticed suppress statements as involuntarily made is **DENIED**. The defendant's motion to suppress post-arrest statements, police observations of the defendant including video recordings, and the results of chemical tests of the defendant's breath as fruit of an unlawful arrest is **GRANTED**. The defendant's motion to preclude unnoticed statements pursuant to C.P.L. § 710.30(3) is **GRANTED**.

This constitutes the decision and order of the Court.

Dated: April 8, 2019  
Bronx, New York



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Linda Poust Lopez, A.J.S.C.